NTSB Order No.
EM-30

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.,
on the 1st day of August 1973.

CHESTER R. BENDER, Commandant, United States Coast Guard,

vs.

RAYMOND MILLY

Docket ME-30

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming the revocation of his merchant mariner's document (No. Z-836920-D1) and all other seaman's documents for misconduct while serving, under authority thereof, as a deck steward aboard the SS MARIPOSA, a passenger merchant vessel of the United States.[1]

The action of the Commandant was taken upon appellant's prior appeal to him (Appeal No. 1901) from the initial decision of Administrative Law Judge Tilden H. Edwards, rendered after a full evidentiary hearing.[2] Throughout these proceedings, appellant has been represented by his own counsel.

From documentary evidence adduced, the law judge found that appellant, serving as described for a foreign voyage of the MARIPOSA, on May 22, 1968, when the vessel was at the port of Suva, in the Fiji Islands, wrongfully engaged in an unnatural sex act with a minor male Fijian person.[3] After concluding that

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[1]The appeal to this Board from the decision of the Commandant is authorized by 49 U.S.C. 1654(b)(2).

[2]Copies of the decisions of the Commandant and the law judge (acting as "hearing examiner") are attached hereto. The title of hearing examiner (5 CFR 930) was changed to administrative law judge by rulemaking action of the Civil Service Commission. 37 Fed. Reg. 16787, August 17, 1972.

[3]The Commandant's decision erroneously recites the date of this offense as May 22, 1970. On pages 1 and 2 thereof, such date

appellant's misconduct was thereby established under 46 U.S.C. 239(g), the law judge entered the order of revocation.

Proof of appellant's offense was in the form of a "Copy of Record" of the First Class Magistrate's Court in Suva, certified by its clerk under seal, transmitted to the Coast Guard by letter dated July 8, 1968, from the American Vice Counsel in Suva.[4] The court record purports show that appellant[5] and a 17-year-old Fijian youth were arraigned jointly before the court on May 22, 1968, charged with committing "unnatural offenses" on that date, contrary section 168(a) and (c), respectively, of the Penal Code of Fiji;[6] each admitted the charge brought against him, both were convicted and then released on bail pending subsequent proceedings.[7]

In his brief on appeal, appellant contends that the criminal prosecution in Fiji deprived him of basic constitutional rights and relying on our prior holding in Commandant v. Dazey,[8] challenges "the validity of using" the record of this foreign conviction as evidence in his hearing before the law judge. His supporting

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is hereby corrected to read "May 22, 1968."

[4]Appellant's counsel stipulated that the court record "is, in fact, a copy of what transpired" (Tr. 12). No issue is raised on appeal over the lack of authentication by the consular officer.

[5]A certification of appellant's execution of the shipping articles for this voyage of the MARIPOSA, admitted without objection, indicates that he was 57 years of age at this time.

[6]Particulars of appellant's offense were set forth as follows: "Raymond Milly on the 22nd day of May, 1968 at Suva in the Central Division, had carnal knowledge of David Mani s/o Subaiya, against the order of nature;" and particulars alleged against his co-defendent were that: "David Mani s/o Subaiya, on the 22nd day of May, 1968, at Suva in the Central Division permitted a male person namely Raymond Milly to have carnal knowledge of himself against the order of nature."

[7]The court record states that appellant was "Bound over 2 years to come up for sentence and in the meantime to keep the peace and to be of good behavior. On bond of [50 pounds]." This effectively closed the case against appellant, since he was allowed to return to his vessel, which left port shortly thereafter. The case against his co-defendant was adjourned "for Probation Officer's Report. Bond [20 pounds]."

[8]Order EM-11, adopted July 8, 1970.

arguments are that a jury trial was not available, he was denied counsel and an opportunity to cross-examine his accusers (both before the magistrate and the law judge), and was not advised that he could remain silent, and, lastly, he asserts that his guilty plea was involuntarily entered. Since the Fijian court record was the only evidence of his misconduct,[9] appellant maintains that he is entitled to restoration of his seaman's documents.[10] Counsel for the Commandant has filed a brief in opposition.

Upon consideration of the briefs of the parties and the entire record, the Board concludes that the findings of the law judge are supported by reliable, probative, and substantial evidence of record. We adopt his findings as our own, except as modified herein. Moreover, we agree that the sanction is warranted under 46 U.S.C. 239(g) and applicable Coast Guard regulations issued thereunder.[11]

Having determined that the foreign court record was prima facie evidence of appellant's misconduct in Fiji, the law judge also held that "unlike U.S. Federal and state judgments, such a foreign judgment is vulnerable to collateral attack by showing that the conviction was ... violative of fundamental constitutional rights guaranteed to U.S. citizens."[12] Appellant does not contest

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[9]Although the decision of the law judge indicates that a logbook entry was also placed in evidence, this is in error according to the hearing record, which indicates that the Coast Guard representative withdrew it after appellant's counsel stipulated to the authenticity of the court record (Tr. 12).

[10]Appellant held temporary seaman's documents during the pendency of his appeal to the Commandant, from December 23, 1971, to December 8, 1972. See 46 CFR 137. 30-15.

[11]Offenses involving perversion are proscribed under these regulations. Thus, American seamen are on notice that "administrative action seeking the revocation" of their documents will be instituted and that this sanction is recommended for such an offense. 46 CFR 137.03-5(a)(b); 137.20-165(b). See e.g., Commandant's decision on Appeal No. 1042 (Molina).

[12]This is stated on page 5 of the law judge's ruling on appellant's motion to dismiss, attached to and made part of his initial decision. The Commandant's decision approaches the same result by analogy, citing Hilton v. Guyot (1895), 159 U.S. 113, and Ritchie v. McMullen (1895), 159 U.S. 235. The doctrine of these decisions, based on comity, is that civil judgments of foreign courts are treated as prima facie evidence only, unless the foreign

these rulings, and we have no hesitancy in accepting them as proper. Rather, the issues raised on appeal call for a determination with respect to the sufficiency of appellant's collateral attack.

The Dazey case, supra, concerned the Japanese conviction of an American seaman for possession of marijuana in violation of that country's marijuana control law. There, the probative value of the court record was outweighed by the seaman's unrefuted testimony indicating that a viable defense might have been presented in his behalf, and the circumstances surrounding his guilty plea before the Japanese court were highly coercive. Moreover, the nature and elements of the Japanese offense were not ascertainable from the record. We held that the seaman's testimony shifted back to the Coast Guard the burden of showing that the Japanese legal system afforded criminal defendants the essential elements of due process, as known in our courts, and, in particular, that this seaman had been given a fair opportunity to defend himself. In the absence thereof, we rejected the Japanese court record as evidence of the seaman's misconduct under 46 U.S.C. 239(g).

The present case is clearly distinguishable. Here, appellant's testimony at the hearing was limited to "contentions that his constitutional rights were, in fact, violated [in the Fiji proceeding] and that is all" (Tr.32). It appears from the court record that the accuseds' rights were explained and that both elected to be tried by the magistrate. Appellant's refutation is that the only advice he received was that if he pleaded guilty, the magistrate would try the case and "they would get me to the ship on time before it sailed" (Tr. 34).

The court record also shows that both accused agreed with the facts presented by the prosecutor, as follows:

> "First Accused, Milly, is a crew member of S.S. "MARIPOSA" sailing today. This morning at 7:30 a.m. "MARIPOSA" entered Suva. Accused, Milly, met Accused 2, David Mani, at Wharf and asked him to show him round the city. Accused, Mani took him to Muanikau at 2 p.m. and was seen walking in the bush by 2 men. The 2 men got suspicious. They saw both Accused persons going under a guava tree undressed. Accused 2, (Mani) lay down and Accused 1, (Milly) had unnatural offense. They were caught by the other 2 men...".

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law allows full and conclusive effect to judgements of American courts under like circumstances, in which event the foreign judgment has the same effect in American courts.

In testifying before the law judge, appellant neither denied that he had committed this public act of perversion nor showed what, if any, defense might have been presented in his behalf. [13] Moreover, cross-examination in such areas was not permitted by the law judge upon objection from appellant's counsel that it would be "beyond the scope" of his direct examination (Tr. 37).

In our view, these were areas of the greatest concern for the purpose of determining whether a foreign criminal judgment should be treated as probative evidence. Yet appellant failed to offer, in rebuttal, even an arguable possibility that the foreign judgment constitutes a miscarriage of justice, either because he was innocent or had a legitimate defense which was not asserted. Thus, our reasoning for shifting the burden of producing evidence to the Coast Guard in Dazey has no applicability here. Furthermore, we are not persuaded that appellant was denied due process.

With respect to his guilty plea, no element of coercion was involved, and the inducement of a speedy return to his ship, if offered, is in the nature of plea bargaining (e.g., for probation), which does not make the plea involuntary under our system of criminal justice where the bargain is kept. [14] We thus find appellant's plea was freely and intelligently made. The right of cross-examining his accusers was thereby waived, and no custodial interrogation was testified to which raised any question of his right to remain silent. [15]

Appellant's unsupported claim of not being advised of his right to counsel was contradicted by the Coast Guard's witness in rebuttal, the paymaster of the MARIPOSA. The latter attended appellant's arraignment in Suva by instruction of the master to "take care of any fines" (Tr.17). He appears to have been a wholly disinterested witness, his impartiality is unchallenged, and we consider him far more credible than appellant in this matter, particularly since Fijian law provided that accused persons in all

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[13]Under Coast Guard regulations, the person charged has the right to "Testify in his own behalf or remain silent." 46 CFR 137.20-45(a) (4). Although no inference of guilt may be drawn from such person's failure to take the stand, appellant's misconduct is rather inferred from the court record which remained unrefuted by him. 2 Wigmore on Evidence §290(e)(5) (1940, Supp. 1972).

[14]Roberts v. Cox, 317 F. Supp. 946 (W.D. Va., 1970).

[15]See also United States v. Welch, (2 Cir., 1972) 455 F. 2d 211, 213 and cases cited therein.

criminal cases have the right to counsel.[16]

A jury trial, as known in this country, appears not to be available in Fiji. Rather, appellant's option was for a trial in the Fijian Supreme Court by a judge and "two or more ... persons from the list of those summoned to serve as assessors at the sessions."[17] The assessors function somewhat like jurors but their "opinions" on the judgment to be rendered are not binding on the judge.[18]

The potential lack of due process in a trial of this type is not at issue here, since appellant's testimony gives no indication whatsoever that this influenced his decision to plead guilty. On the whole, therefore, we find appellant's collateral attack deficient. It presents no occasion for abstract considerations of due process in connection with the court record of his conviction in Suva.

In our view, appellant's offense on a foreign shore while serving abroad the MARIPOSA justifies the sanction here imposed. This measure is designed to protect others aboard passenger liners from future acts of perversion by this seaman, whose propensity therefor has been clearly demonstrated.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The order of the Commandant affirming the law judge's revocation of appellant's seaman's documents under authority of 46 U.S.C. 239(g) be and it hereby is affirmed.

REED, Chairman, McADAMS, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order.

(SEAL)

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[16]Section 182 of the Criminal Procedure Code, Laws of Fiji (1967 Revised Edition) states that "Any person accused of an offence before any criminal court, or against whom proceedings are instituted under this Code in any such court, may of right be defended by a barrister and solicitor."

[17]Id., section 266.

[18]Id., section 281.